PREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 406.

McCULLOUGH TOOL COMPANY,
Petitioner,

vs.

WELL SURVEYS, INC. (now by change of name DRESSER SIE, INC.) and DRESSER INDUSTRIES, INC.,
Respondents.

McCULLOUGH TOOL COMPANY,
Petitioner,

vs.

DRESSER INDUSTRIES, INC.,
Respondent.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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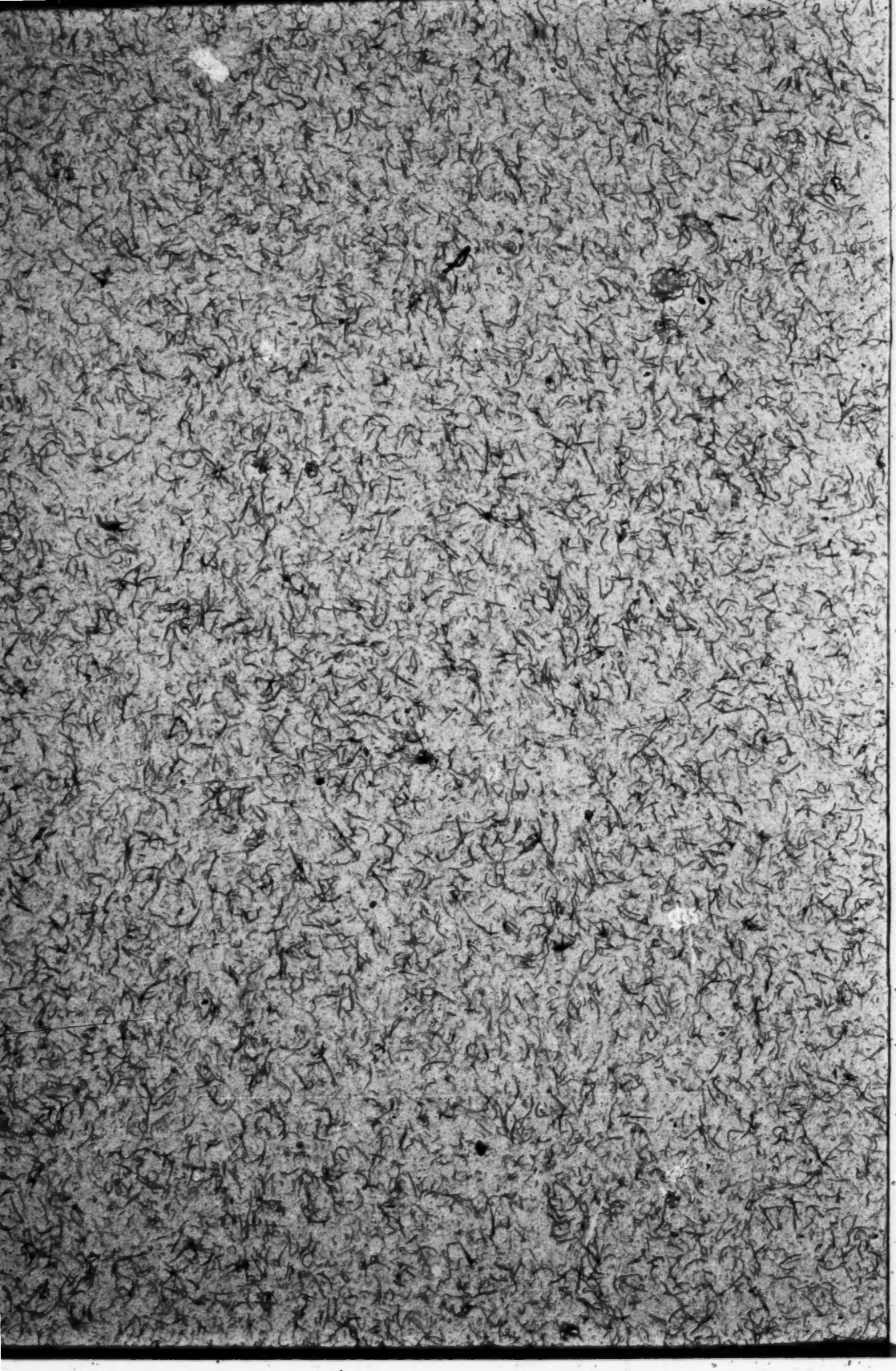


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OPINIONS BELOW.

The opinion of the Court of Appeals for the Tenth Circuit in the present contempt proceeding is reported at 395 F. 2d 230, and appears on pages 1 to 21 of the Appendix to the Petition.* The oral opinion of the United States District Court for the Northern District of Oklahoma in this proceeding is not reported, but appears at pages 4949 to 4954 of the Record, and is reproduced as Appendix A of this Brief. The memorandum opinion of

* Hereinafter cited as "P. App."

the District Court overruling Petitioner's Motion for Relief from Judgment on grounds of misuse appears on page 4599 of the record and is reproduced as Appendix B of this brief.

The opinion of the Court of Appeals for the Tenth Circuit in the original infringement suit out of which the present contempt proceeding emerged is reported at 343 F. 2d 381. The Findings of Fact and Conclusions of Law of the District Court in the original infringement suit are reported at 199 F. Supp. 374.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

We have no quarrel with Petitioner's statement of question 1, except that the words "Summary Judgment" in the fifth line should apparently be "Declaratory Judgment."

We disagree emphatically with the statement of questions 2 and 3. The factual assumptions in question 2 omit points which we believe to be controlling. Question 3 assumes the existence of "substantial issues of material facts," when there are no such issues. We submit that the following is a proper statement of the question actually presented:

> Where, after full consideration of the prior art, a District Court has determined the validity and scope of a patent and decided that a defendant's apparatus infringes it, and, after affirmance by the Court of Appeals and after issuance of an injunction, the defendant continues to use its apparatus commer-

cially with only a minor and colorable alteration which does the same work in substantially the same way to accomplish the same result as the unaltered apparatus, and which still falls within the scope of the claims as previously determined, and the patent owner brings contempt proceedings against him, is it a violation of Rule 56 FRCP, or of the Due Process Clause of the Fifth Amendment, or erroneous in any other respect, for the District Court to render a summary judgment holding the defendant in contempt?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

These provisions are adequately set forth in the Petition.

STATEMENT OF THE CASE.

Petitioner's statement omits important facts and contains some inaccurate statements. The following additional statement is deemed necessary to correct these inadequacies:

1. In its original decision that the Swift patent was valid and infringed; rendered March 16, 1961, the District Court reviewed the prior art and determined the scope of the Swift patent. As shown by Findings of Fact 53 to 65 (R. 85 to 86) and 128 to 133 (R. 269 to 271), the Court found that what Swift had invented was apparatus for making radiation measurements simultaneously with the locating of casing collars, the casing collar indications being used to provide accurate depth indicia on radioactivity well logs. These Findings were affirmed by the Court of Appeals in its original decision (343 F. 2d 381, 392), where it stated:

"* * * Swift was the first to utilize casing collar signals for the purpose of making primary depth measurements separately from, but at the same time and place as, radioactivity measurements as distinguished from secondary measurements made at the surface. It may fairly be stated that none of the items of prior art relied upon by McCullough, either individually or collectively, disclose such a method or apparatus. * * * Thus, while the prior art does disclose the two elements of casing collar locator and radioactivity well logging, it does not disclose any combination of these two elements so as to produce the result achieved by Swift, namely, the combining of a magnetic casing collar locator and radioactivity well logging and the providing of a transmitter system so that casing collar signals and radiation signals can be transmitted and recorded to show earth formation in correlation with depth."

2. The modification made by McCullough in its apparatus after the District Court's original decision is described and shown in the Stroud Affidavit (R. 4148-4156), presented by McCullough at the injunction hearing, and is illustrated by the drawing attached as Exhibit A to McCullough's Complaint in its declaratory judgment action (R. 4612). McCullough admitted in open court that its modified device was "apparatus that simultaneously makes radioactivity measurements and locates casing collars in a well" (R. 4873). As recognized by the District Court when it entered summary judgment against McCullough in the present contempt proceedings, the only difference between the modified apparatus and the original apparatus was that in the modified apparatus the casing collar signals and the radiation detector signals, rather than being combined in a common amplifier, were separately amplified before being combined (R. 4951). The Court went on to say that the modified apparatus "does

the same work in substantially the same way to accomplish substantially the same result," and that it "comes within the scope of the claims in the Swift patent" (R. 4952). It stated specifically:

> "McCullough has admitted in its affidavits and in open court that its new device is for simultaneously making radioactivity measurements and locating the casing collars in a cased well, which is the scope of the Swift patent as heretofore determined by this Court. * * * From the record, it is determined that the McCullough device is only a colorable variation of the Swift patent." (R. 4953.)

All these findings of the District Court were affirmed by the Court of Appeals, which held (P. App. 6):

> "In proceeding with the contempt citation the trial court found that there was no genuine issue of material fact and, therefore, that W. S. I. was entitled to a judgment as a matter of law. There was clearly no error in the trial court's proceeding with the contempt citation rather than requiring the issue to be tried in an infringement hearing. We believe that the trial court was correct in summarily deciding that the modified device was a colorable variation of the Swift Patent, that it thus infringed the Swift Patent and violated the June 15 injunction. The validity of the Swift Patent and the scope of its claims were conclusively determined as between the two parties in the instant suit in the original infringement suit."

3. With regard to the question of alleged misuse, McCullough's statement fails to mention the fact that on October 19, 1966, almost three months before the entry by the District Court of its summary judgment of contempt, McCullough had filed a motion, with numerous affidavits and a detailed brief, asking for relief from the judgment in the infringement suit and dissolution of the injunction, based on respondent's alleged misuse of pat-

ents (P. App. 3; R. 4235-4457). This motion was overruled by the District Court on November 29, 1966, on the ground that McCullough had failed to state a claim upon which the relief sought could be granted (R. 4779, 4597-4599). Although the Court had ruled that McCullough had failed to state a misuse defense, McCullough indicated that it had additional evidence to bring forth. The Court granted McCullough until December 15, 1966 to complete and furnish respondents copies of any additional affidavits or documents, and a list of witnesses with a summary of what they would testify, in support of any misuse defense (R. 4874-4905). The time was set as 10 days after respondents made certain documents available to McCullough, which respondents did on December 5, 1966. The Court later extended McCullough's time to 20 days from November 29, or until December 19 (R. 4906). McCullough failed to supply any such additional documents, affidavits, list of witnesses or summaries, either within the time limited or at any time thereafter (R. 4969).

On December 21, 1966, WSI filed its motion for summary judgment in the contempt proceeding, and also for an order precluding McCullough from introducing additional evidence of misuse. At the hearing on January 12, 1967, the Court granted both motions, entered summary judgment in the contempt proceeding, and dismissed McCullough's declaratory judgment action (R. 4702-4705).

The Court of Appeals affirmed the District Court in all respects. After reviewing McCullough's contentions in detail, it held that the District Court had correctly ruled that McCullough had not stated a case of patent misuse, and had properly overruled McCullough's motion for relief from judgment (P. App. 10-20). With regard to McCullough's contention that the District Court had erred in precluding it from introducing further evidence on the

misuse issue, it held that McCullough had been advised by the Court that it must furnish the witness list and additional information within the time limited by the Court, that it was McCullough's burden to comply, and that its failure to do so without any sufficient excuse warranted the granting of respondent's motion to preclude introduction of further evidence (P. App. 20, 21).

4. On page 5 of its Petition, McCullough states that "it was *agreed and ordered* by the Trial Court that Petitioner could present evidence of non-infringement, evidence to determine the scope of the Swift claim, and evidence of misuse of Swift and Fearon after March 16, 1961 * * *" *

The fact is that throughout the November 29 hearing, the Court made it entirely clear that it was entertaining the possibility of passing on the matter summarily, and invited briefs directed to the propriety of entering summary judgment in the event that it determined that there was but a colorable change in McCullough's structure (R. 4777-4778, 4936-4938). Thereafter, respondents filed a Memorandum of Authorities for Summary Judgment in Contempt Proceedings (R. 4560-4566), and McCullough filed an opposing memorandum. On January 12, 1967, the Court indicated that it had studied these memoranda as well as the pleadings and affidavits and had "decided that these cases can now be determined on the Record before me" (R. 4950). It then rendered its decision sustaining respondent's motion for summary judgment and dismissing petitioner's declaratory judgment suit, which the Court of Appeals thereafter affirmed.

A sequential statement of the facts in the case appears in the Court of Appeals opinion (P. App. 1 to 4, 20 to 21).

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* Emphasis throughout this brief is ours, unless otherwise indicated.

ARGUMENT.

1. The decision below on the patent issues involves no new question and is clearly correct.

There is no question that Rule 56 authorizes summary judgment as to the issue of infringement in patent cases where there is no genuine issue as to any material facts. *Tractor Supply Co. v. International Harvester Co.*, ____ F. Supp. ____, 151 U.S.P.Q. 447 (N.D. Ill. 1966); Moore, *Federal Practice*, Vol. 6, Para. 56.17 [1], at page 2464 (2d Ed., 1965).

The issue of contempt is primarily an issue of infringement. Where summary judgment is appropriate in an original trial for infringement, it is *a fortiori* appropriate in a contempt proceeding, which is inherently a summary proceeding. *Parker Pen Co. v. Greenglass*, 206 F. Supp. 796 (D.C.N.Y., 1962); Barron & Holtzoff, *Federal Practice and Procedure*, Vol. 3, page 506 (Rules Edition 1958).

Leman v. Krentler-Arnold Co., 284 U. S. 448 (1932), is a patent case in which this Court sustained a finding of contempt made summarily, although the question of the propriety of the summary procedure was apparently not raised. Accord, *Textag Co. v. Hayslip*, 192 F. 2d 435 (5 Cir., 1951); *Wilson v. Byron Jackson Co.*, 93 F. 2d 577 (9 Cir., 1937); *Kiwi Coders Corp. v. Acro Tool & Die Works*, 250 F. 2d 562 (7 Cir., 1957).

The law on this point is well summarized in the opinion of the Court of Appeals in the instant case (P. App. 4, 5):

> "The question is presented as to how a patentee should be allowed to proceed when following a successful infringement suit the infringer modifies the infringing structure and continues as before. Allowing the patentee to proceed by a summary contempt proceeding in all cases would unnecessarily deter

parties from marketing new devices that are legitimately outside the scope of the patent in question. On the other hand, to require in each instance the patentee to institute a new infringement suit diminishes the significance of the patent and the order of the court holding the patent to be valid and infringed. Obviously there must be a dividing point between those cases which should be handled by a summary contempt proceeding and those cases which should be more fully viewed in an infringement proceeding. Courts have uniformly held that the standard to be applied in determining the dividing point is whether the alleged offending device is 'merely "colorably" different from the enjoined device or from the patent.' Siebring v. Hansen, 8 Cir., 346 F. 2d 474 at 477. See Hartford-Empire Co. v. Obear-Nester Glass Co., 8 Cir., 95 F. 2d 414; American Foundry & Mfg. Co. v. Josam Mfg. Co., 8 Cir., 79 F. 2d 116; and Wadsworth Electric Mfg. Co. v. Westinghouse Electric & Mfg. Co., 6 Cir., 71 F. 2d 850. It is further stated to be 'well established that it is within the discretion of the trial court to determine whether the charge of infringement is to be determined in a contempt proceeding or in a separate action * * *.' Blatz v. The Fair, 7 Cir., 279 F. 2d 899 at 903. See also John W. Gottschalk Mfg. Co. v. Springfield Wire & Tinsel Co., 1 Cir., 90 F. 2d 468."

On page 7 of its Petition, McCullough argues that the instant case presents "questions of fact," necessitating a full trial, and cites a number of cases on what are considered questions of fact in infringement cases. For example, it cites *Graham v. John Deere Co.*, 383 U.S. 1 (1966) for the proposition that the difference between the claimed invention and the prior art is a question of fact. McCullough fails to distinguish between a *question* of fact and an *issue* of fact. Under Rule 56, there must be a "genuine issue" of material fact to preclude summary judgment.

In the present case, the question of infringement, and the question of the differences between the prior art and the claimed invention, had already been determined by the District Court and the Court of Appeals in the original infringement case. The District Court, affirmed by the Court of Appeals, had found that the Swift patent disclosed and claimed, as the Swift invention, apparatus for simultaneously making radioactivity measurements and locating casing collars in a cased well. On remand by the Court of Appeals, the District Court had enjoined use of apparatus for simultaneously making radioactivity measurements and locating the casing collars in a cased well, as exemplified by WSI Exhibit 10, page 5-A. On the contempt hearing, McCullough admitted that its modified device was apparatus for simultaneously making radioactivity measurements and locating the casing collars in a cased well (R. 4873). There was thus no remaining *issue* of fact, and the Court properly entered summary judgment.

On pages 14 to 17 of its Petition, McCullough cites cases holding that a defendant in an infringement suit may refer to the prior art to limit the scope of the plaintiff's patent—this because a patent cannot validly be given a construction that would include devices built according to the teaching of the prior art. We do not question the holding of these decisions. But in the instant case, in which the scope of the Swift claims relevant to the prior art had already been determined by the District Court and the Court of Appeals, the District Court in the contempt proceedings was well justified in summarily applying such previously determined scope to the modified device. There was no need or justification for the Court to consider further evidence of the prior art in respect to the scope of the Swift patent. As stated by the Court of Appeals (P. App. 6):

"We believe that the trial court was correct in summarily deciding that the modified device was a colorable variation of the Swift patent, that it thus infringed the Swift patent and violated the June 15 injunction. *The validity of the Swift patent and the scope of its claims were conclusively determined as between the two parties in the instant suit in the original infringement suit.* * * * This conclusively answers McCullough's claims that it should be allowed to introduce evidence upon issues (a) and (b)."

In accord with the decision of the Court of Appeals is *Tinius Olsen Testing Mach. Co. v. Baldwin-Southwark Corp.*, 25 F. Supp. 885 (E.D. Pa., 1938), where the Court ruled on page 886:

"Evidence of the prior art is relevant upon the scope and validity of the patent, but those issues have already been decided and are res adjudicata. The only question now before the Court is infringement, and that question must be determined entirely in the light of its decision in the original case."

To the same effect is *Krentler-Arnold Hinge Last Co. v. Leman*, 50 F. 2d 699, 702 (1 Cir., 1931). The Court there held:

"The District Court, however, had before it the record and proceedings in the original equity suit, including the decree in that suit. The proceedings in that suit disclosed that the scope and validity of the claims here in question were put in issue in the original equity suit and actually tried; and that they were held not to be anticipated, but valid as drawn. In other words, that they were not too broad in view of the prior art as presented and litigated in that case. The parties to that suit were the same as in the present proceedings, and, as the scope and validity of the Peterson claims here in issue were put in issue and actually tried and determined in that suit, the decree in that suit determining those issues is as evidence

conclusive in these proceedings as to the scope and validity of the claims."

In the *Krentler-Arnold* case, the Court of Appeals affirmed the District Court in the determination of contempt, but remanded the case to the District Court for a different determination of damages. This Court at 284 U. S. 448 (1932) reversed the Court of Appeals on the matter of damages and affirmed the entire judgment of the District Court which found contempt.

See also *Wadsworth Elec. Mfg. Co. v. Westinghouse*, 71 F. 2d 850 (6 Cir., 1934), *cert. den.*, 293 U. S. 604 (1934), and *Eureka Tool Co. v. Wire Rope Appliance Co.*, 265 Fed. 673 (8 Cir., 1920).

2. There is no conflict between the decision below and the decision of the Court of Appeals for the Fourth Circuit in the Ransburg Case.

On page 13 of its Petition, McCullough cites as being "in direct conflict with the ruling below" the decision of the Court of Appeals for the Fourth Circuit on April 11, 1968 in *Ransburg Electro-Coating Corp. v. Ionic Corp.*, 395 F. 2d 92.

In the cited case, the Court of Appeals reversed a ruling of the District Court that a new device adopted by the defendant after issuance of an injunction against infringement was a contempt of the injunction. However, a reading of the decision, and of the opinions of the District Court and the Court of Appeals in Ransburg's original infringement suit,* shows clearly that there is no conflict with the decisions of the District Court and the Court

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* *Ransburg Electro-Coating Corp. v. Proctor Electric Co.*, 203 F. Supp. 235 (D. Md., 1962), *affirmed* 317 F. 2d 302 (4 Cir., 1963).

of Appeals in the instant case, but that the differing results are due to factual differences between the cases.

In the *Ransburg* case, the District Court and the Court of Appeals had determined in the original infringement proceedings that Ransburg's patent for a spray-painting system covered at "the minimum" any case in which the paint was "atomized under circumstances in which electrostatic forces *either predominate, or form a significant factor*" (203 F. Supp., at 251).

In the contempt proceedings, the defendant argued that its new device did not infringe the Ransburg patent, because electrostatic forces played *either no part, or an insubstantial part,* in its operation. Defendant further argued that similar devices had been used by Ransburg before it made the invention covered by its patent. Holding that the defendant's new device was not an infringement and not a contempt, the Court of Appeals stated, at 395 F. 2d 97:

> "We then come to the conclusion that infringement of Ransburg's patents on the No. 2 system is not avoided by partial dependence upon some other means to achieve atomization of the paint as long as there is *substantial dependence* upon electrostatic forces within the teaching of the patents, as the District Court initially held and we approved. There is no infringement, however, when dependence upon the electrostatic forces to atomize the paint is so *insubstantial and minimal* that it does not exceed the employment of those same forces in the prior art systems."

Thus, in the *Ransburg* case, the Court held that the defendant's new device fell *outside* the minimum scope of the patent as originally determined, and used the prior art not to reconsider the prior determination of minimum scope, but rather to determine whether or not the patent

could be accorded a still broader scope sufficient to cover the new device.

In the instant case, the District Court in its original decision, after full consideration of the prior art, held that what Swift had invented was *apparatus for simultaneously making radioactivity measurements and locating casing collars in a cased well.* The Court of Appeals in its original decision reached the same conclusion, stating at 343 F. 2d 392:

> "* * * Swift was the first to utilize casing collar signals for the purpose of making primary depth measurements separately from, but at the same time and place as, radioactivity measurements as distinguished from secondary measurements made at the surface. It may fairly be stated that *none of the items of prior art* relied upon by McCullough, either individually or collectively, *disclose such a method or apparatus.*"

The apparatus thereupon enjoined was that "for simultaneously making radioactivity measurements and locating casing collars in a cased well as exemplified by W.S.I. Exhibit 10, page 5-A" (R. 4178-9).

In the contempt proceedings, McCullough admitted that its modified device was *apparatus for simultaneously making radioactivity measurements and locating the casing collars in a cased well* (R. 4873). This admission was corroborated—if corroboration were needed—by McCullough's Stroud Affidavit (R. 4148), and by the drawing of its modified apparatus attached to its declaratory judgment complaint (R. 4612). In the instant case, unlike the *Ransburg* case, the modified device was within the scope of the patent as originally judicially determined, and thus there was no occasion to call on the prior art to determine what broader scope the patent might have been accorded.

What McCullough is attempting is, not to use the

prior art to limit any enlargement of the original determination of scope, as was done in the *Ransburg* case, but to get the Court to reconsider and further limit the original determination, even though that determination is perfectly clear, and was made after full consideration of the prior art. This, under the cases above cited, McCullough is not entitled to do.

It is also clear that the *Ransburg* case did not involve colorable variations. McCullough appears to confuse colorable variations with equivalents. While all colorable variations are necessarily equivalents, all equivalents are not colorable variations. There is, by definition, no real or substantial difference between colorable variations; whereas different devices may be equivalent. Reference to the prior art may at times be necessary to determine whether or not two really different devices are equivalent, as in *Ransburg*. However, where the devices have been found to be only colorable variations, as here, "equivalents have no place, and the prior art is available for no purpose." *Eureka Tool Co. v. Wire Rope Appliance Co., supra,* at 675. Summary judgment is then entirely appropriate under the cases already cited.

3. The decision below on the misuse issues involved no new question and is clearly correct.

The facts as to the action of the courts below on the misuse issue are set forth in detail in Section 3 of our Statement of the Case, and in the opinion of the Court of Appeals. Briefly, the facts are that on October 19, 1966, McCullough filed a motion for relief from judgment on grounds of misuse, supported by some 200 pages of briefs and affidavits. On November 29, 1966, the District Court overruled this motion, on the ground that McCullough had failed to state a case of misuse (Memo-

randum, Appendix B of this Brief). McCullough then represented that it had additional evidence of misuse to bring forth, and the Court gave McCullough until December 19 to submit additional affidavits and documents, and a list of witnesses with a summary of what they would testify, in support of any misuse defense. McCullough failed to supply any such additional documents, affidavits, list of witnesses or summaries, either within the time limited or at any time thereafter. On December 21, respondents filed their motion for summary judgment in the contempt proceeding, and for an order precluding McCullough from introducing additional evidence. On January 12, the Court sustained both motions.

On appeal, the Court of Appeals reviewed exhaustively the District Court's decision overruling McCullough's motion for relief from judgment, and affirmed the District Court's decision that no case of misuse was stated (P. App. 10-20). It then considered McCullough's contention that the District Court had erred by deciding the case summarily without allowing McCullough to introduce further evidence on the misuse issue. As to this, it held that it was McCullough's burden to produce its evidence and list of witnesses within the time limited by the Court, that McCullough had shown no valid reason for failing to do so, and that the District Court's entry of summary judgment was fully justified (P. App. 20-21).

We believe that recital of the facts clearly indicates that the decision is correct. In addition, it has broad support in the decided cases.

In *Berger v. Brannan*, 172 F. 2d 241 (10 Cir. 1949), *cert. denied* 337 U. S. 941 (1949), the Secretary of Agriculture sued for treble damages for selling rice at more than the maximum legal price. The Government presented a summary of the overcharges, compiled from documents.

Defendant denied the correctness of the summary, and the District Court gave him 60 days to point out its inaccuracies. The defendant failed to do so within this time, and the Court granted the Government's motion for summary judgment. Affirming this judgment, the Court of Appeals stated at page 243:

> "Since the only issue between the parties was what material data was recorded on appellant's books and since appellee had alleged his Exhibit A correctly reflected all pertinent data, the Court was not required to stand by, permit appellee to rest on its general denial, and await the outcome of an expensive trial, to see whether such a denial was sustained * * * *The Court had power under Rule 16 to require appellant to point out specifically what items in its books were omitted from appellee's Exhibit A. Appellant having failed to do this, there was no real issue of fact in dispute.*"

In *Gifford v. Travelers Protective Association*, 153 F. 2d 209 (9 Cir., 1946), the Court stated at page 210:

> "Where a defendant presents evidence on which it would be entitled to a directed verdict, if believed, and which the plaintiff does not discredit as dishonest, it rests on the plaintiff, in opposing defendant's motion for summary judgment, *at least to specify some opposing evidence which it can adduce, and which might change the result.*"

Additional cases to the same effect are *California Apparel Creators v. Wieder of California*, 162 F. 2d 893 (2 Cir., 1947); *Holcomb v. Aetna Life Insurance Co.*, 255 F. 2d 577 (10 Cir., 1958); *Engel v. Aetna Insurance Co.*, 139 F. 2d 469 (2 Cir., 1943); *Norton v. McShane*, 332 F. 2d 855 (5 Cir., 1964); and *Standard Dredging Corp. v. Inter American Center Authority*, 351 F. 2d 470 (5 Cir., 1965).

4. This case presents no substantial issue under the Due Process clause.

So far as the patent issues in the instant case are concerned, we have shown that there was no genuine issue of material fact to preclude summary judgment under Rule 56. In view of this, Petitioner's attack is really on the Rule itself—a contention that the Due Process clause requires that a party be given a hearing whether there is a genuine issue of fact or not. This Court rejected this contention when it adopted Rule 56 in 1938.

So far as the misuse issues are concerned, we submit that a defendant is not denied due process by a summary judgment entered against it when, after failing to state a case, it has failed to furnish additional information, or show a valid excuse, within the time limited by the court for furnishing such information. This conclusion is at least implicit in all the cases cited under heading 3 above.

The cases cited by McCullough on page 9 of its Petition in support of its contention that the decisions below have deprived it of due process of law are very wide of the mark. *Roberts v. Anderson,* 66 F. 2d 874 (10 Cir., 1933), held that a party was denied due process of law when a court refused to allow him to be represented by the counsel of his choice and forced on him a lawyer appointed by the court. In *Windsor v. McVeigh,* 93 U. S. 274 (1876), this Court held that a defendant was denied due process when, after he had appeared pursuant to a summons in condemnation proceedings, the lower court entered a default judgment against him, because he was a resident of the Confederacy and a rebel. This Court, however, stated explicitly that the period within which the right to be heard must be exercised was subject to regulation by "the rules or orders of the court," and that a defendant

might properly be defaulted if he did not exercise his right "within the period thus prescribed." (93 U. S., at 278.)

CONCLUSION.

We respectfully submit that the Petition herein should be denied.

Respectfully submitted,

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APPENDIX A.

The Court: We will go on the record now. 4271, Well Surveys and Dresser Industries, Incorporated, versus McCullough Tool Company, and 6467, McCullough Tool Company, etc., versus Dresser Industries, Incorporated, a corporation.

The Court had contemplated having an additional pretrial, and that is what was set, but the more I get into this matter and the more I have studied the whole record, and the more I reflect over the Court's thinking based on the record, it seems to me that any further hearings in this matter may prove more or less useless. I see nothing to be gained except further delay in an already long protracted case. So, I have restudied and regone into this matter based on, first, the Court is going to rule on the motions pending, and in ruling on the motions, as the Court is about to do, I think it will take care of the situation and put us back into another position, and we can go from there.

As I look at this whole matter, and to review where we are, McCullough has filed a separate suit seeking declaratory judgment, that its modified apparatus does not infringe the Swift patent. Then Well Surveys has filed, in the original suit, which is 4271, a motion for order citing McCullough for contempt; a motion for summary judgment in the contempt proceeding; and a motion to dismiss the declaratory judgment action in cause No. 6467. Then McCullough filed a motion to dismiss the contempt action in 4271.

Will you all agree that is where we are on the motions?

Mr. McDermott: Seems to me it is.

Mr. Whann: I believe that is correct, Your Honor.

The Court: The Court has reflected and studied, and

upon consideration of these pleadings, the affidavits and briefs filed in support and opposition thereto, and the record of the former trial which I have gone into, I have decided that these cases can now be determined on the record before me.

When the Court entered the injunction on June 15, 1966, the Court intended to carry out the judgment of the trial court in the former trial, that was the intent of the Court, which judgment was affirmed by the Court of Appeals of the Tenth Circuit, and that Circuit was affirmed by a certiorari being denied by the Supreme Court, and the purpose of the Court was at that time to enter an injunction in the usual form against further infringement of the Swift patent. That was the intent of the Court.

At the hearing on the injunction, this Court refused to specifically exclude therefrom the modified apparatus of McCullough because it was not known at that time whether it infringed the Swift patent. So, I asked all of you and you agreed and we did delete, I think, the last sentence specifically.

The injunction issued prohibited McCullough from manufacturing or selling apparatus for simultaneously making radioactivity measurements and locating the casing collars in a cased well as exemplified by Well Surveys exhibit number 10.

Now, the question is, "From all the pleadings and from all the record, does McCullough's modified apparatus infringe the Swift patent?"

In both the Swift apparatus and the original McCullough apparatus, the casing collar signal and the radiation detector signal were applied to the same subsurface amplifier, which amplify both signals, and the two signals were then applied to the well logging cable for transmission to the surface. The only difference in the McCullough

modified apparatus is that separate amplifiers are used to amplify the resultant signals, and the signals are not combined in a common amplifier, but combined when the casing collar signals are applied directly to the cable. The signals remain combined until they reach the surface where they are simultaneously recorded to provide a log in which the radiation measurements are accurately correlated with depth by the casing collar record.

McCullough contended at the former trial and before the Circuit Court that its device did not infringe Swift because that device had a different combination of parts and a different mode of operation than the Swift patented device. Now, in that particular instance, and at that trial, and on appeal, the Circuit Court held: "It is obvious from the record that the accused device does the same work in substantially the same way to accomplish substantially the same result as the device disclosed in Swift. Thus, the findings of infringement of the Swift patent are not clearly erroneous."

I am of the opinion that the record here discloses that this language applies to the modified device, that is, it does the same work in substantially the same way to accomplish substantially the same result as the Swift device.

The Court feels that the modified apparatus comes within the scope of the claims in the Swift patent.

McCullough refers in its briefs and affidavits to five changes which it contends differentiate its modified apparatus from the Swift invention.

The first two changes are that both signals are not fed into a common amplifier and the combined signals then introduced to the conductor leading to the surface. As I read claims one, two, five and six, the language thereof does not limit the Swift device to the use of a common amplifier.

In claimed changes three, four and five, McCullough contends its new apparatus differs from the Swift in that the two signals are independent of, and have no effect on, each other, and that the casing collar locater does not interrupt any signal of radioactivity. These differences were features of the original McCullough apparatus, and were found by the trial court not to be distinguishing features from the Swift claims.

So, the ultimate issue, as the Court sees it, the ultimate issue to be determined, is whether or not the modified apparatus of McCullough is an infringement of the Swift patent. McCullough has admitted in its affidavits and in open court that its new device is for simultaneously making radioactivity measurements and locating the casing collars in a cased well, which is the scope of the Swift patent as heretofore determined by this Court. The injunction covered any device which infringed the Swift patents. From the record, it is determined that the McCullough device is only a colorable variation of the Swift patent.

The Court finds that there is no genuine issue of material fact and that plaintiff is entitled to a judgment as a matter of law.

So, in the disposition of this matter by the motions, the Court will, in Civil Action No. 4271, Well Surveys versus McCullough, the motion for order citing McCullough for contempt is sustained. The motion for summary judgment is sustained. The motion of McCullough to dismiss contempt actions is overruled.

In Civil Action 6467, the motion of Dresser Industries to dismiss is sustained, and that cause of action is hereby dismissed.

APPENDIX B.

Memorandum.

The Court has reviewed defendant's motion for relief from judgment, dissolution of injunction, and vacation of order for accounting, based on misuse of patents, together with the affidavits in support thereof and the briefs filed by both parties, and has concluded that defendant has not stated a case for granting of its motion.

The Court believes that plaintiffs' actions to enforce the Swift Patent, as shown by the affidavits and the moving papers, were perfectly legitimate procedures for the protection of plaintiffs' patent rights and their licensees. When a patentee is receiving a royalty from licensees for use of its patent, it has some obligation to protect them by enforcing its patent against unlicensed competition. There is no showing of any effort on plaintiffs' part to corner the market or improperly extend the monopoly of their patents.

Plaintiffs brought their infringement actions after attempting to find out whether their patents were being infringed. This was difficult to do, as operators would sometimes not give plaintiffs access to their equipment, or inform plaintiffs as to what they were using, and plaintiffs had to proceed on the best information available. Even though plaintiffs were sometimes in doubt as to infringement when they filed suit, and later dismissed the action as to some patents, the Court believes that, under the circumstances, bringing suit, rather than merely threatening to do so, was the proper way to find out whether there was in fact infringement.

Defendant's motion is overruled.

Filed January 13 1967.

